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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,

Petitioner,

vs.

MICHAEL LEE HILL,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When presenting an objection pursuant to *Batson v. Kentucky*, must the party challenging the exercise of the other party's peremptory challenges raise this issue before the jury panel is discharged in order for the objection to be timely and, if so, may a state legislature circumvent such a rule by enacting a statute extending the time for raising the challenge to a point after the jury panel is discharged?

2. May an accused make out a prima facie case under *Batson* where only one member of a racial group is excluded by peremptory challenge and all other members of that group remain on the jury?

3. May a reviewing court determine that a *Batson* prima facie case was established based on factors different from those urged at trial by the objecting party?

4. Where the trial court makes no formal ruling on the existence of a *Batson* prima facie case but the attorney who has exercised the questioned peremptory challenges volunteers race-neutral explanations and the trial court then overrules the *Batson* motion without specifying the reasons for this ruling, may the reviewing court apply the mootness doctrine to avoid ruling on whether a prima facie case was made out, even though the reviewing court has determined that the explanations were not race-neutral and orders the conviction reversed?

5. In reviewing a decision of the trial court on the ultimate *Batson* question, may a reviewing court, applying the "clearly erroneous" standard of review, consider only those factors in the record that contradict the trial court's

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rejection of the *Batson* claim or is the reviewing court required to examine the record as a whole?

6. Where an accused claims his *Batson* rights were violated but presents no meaningful defense to the charges at trial and punishment is set by the trial court, is the reviewing court precluded from applying a harmless error analysis even where the convicting jury was racially mixed?

LIST OF PARTIES

MICHAEL LEE HILL,
Appellant below and Respondent herein

THE STATE OF TEXAS,[1]
Appellee below and Petitioner herein

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[1] The State of Texas is represented by the Dallas County District Attorney. See letter of authorization from Attorney General of Texas contained in Appendix.

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No. _____

In The

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October Term, 1992

THE STATE OF TEXAS,

Petitioner,

vs.

MICHAEL LEE HILL,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on January 8, 1992. For clarity, reference to petitioner is by "State" or "Texas" and reference to respondent is by "Hill."

Following the denial of the State's first Motion for Rehearing on April 15, 1992, the State's second Motion for Rehearing was timely filed by mail and was received by the Court of Criminal Appeals on May 4, 1992. This second Motion for Rehearing was dismissed by the Court of Criminal Appeals on May 4 since the Court's mandate had issued on May 1, 1992.

OPINION BELOW

The opinion of the Court of Criminal Appeals appears in the Appendix as *Hill v. State*, 827 S.W.2d 860 (Tex. Crim. App. January 8, 1992).[2]

JURISDICTION

The opinion of the Court of Criminal Appeals was entered on January 8, 1992. On January 29, 1992, the State timely filed a first motion for rehearing. That motion was overruled, without further opinion, on April 15, 1992. The State's second Motion for Rehearing was timely filed by mail on April 28, 1992 and received by the clerk of the Court of Criminal Appeals on May 4, 1992. In the meantime, on May 1, 1992, the Court of Criminal Appeals had issued its mandate ordering a retrial on the case. Because the Court's mandate had issued on May 1, upon receipt of the State's second Motion for Rehearing on May 4, the Court ordered the State's second Motion for Rehearing dismissed.[3] Texas then filed her motion to recall the mandate of the Court of Criminal Appeals (and to stay reissuance of the mandate until 90 days had elapsed) to enable the State to seek review by this Court. This motion was received on May 27, 1992 and was overruled by the

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[2] The opinion of the Court of Appeals which was reviewed by way of Petition for Discretionary Review by the Court of Criminal Appeals of Texas is also included in the Appendix. This opinion is reported at: 787 S.W.2d 74 (Tex. App. – Dallas 1990).

[3] While awaiting the Court's determination of the State's Motion for Rehearing, counsel of record sought permission from the Attorney General of Texas to seek a Writ of Certiorari from this Court on behalf of the State. Permission was received on May 4, 1992.

Court of Criminal Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, Section 1 states in relevant part:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The instant case involves the prosecution and conviction of Hill for the offense of aggravated robbery[4] following a jury trial had in Dallas County, Texas. After the return of the jury's verdict on the issue of guilt, the State presented additional evidence to the trial court which set Hill's punishment at 60 years confinement in the Texas Department of Corrections.

The trial on the issue of guilt was extremely brief.[5]

The State's first witness was the complainant who testified she was the owner of a fabric store located in a strip shopping center in the city of Irving, Texas. On the day of the offense, shortly after the store had opened, Hill walked past the store, then returned and entered the store and began looking at fabric that was displayed. When the complainant asked if she could help him, Hill pulled a

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[4] TEX. PENAL CODE ANN. § 29.03 (Vernon 1989), proscribes the offense of aggravated robbery.

[5] The court reporter's transcription of the evidence offered to the jury on the issue of guilt is recorded in 62 pages of 25 lines per page. Defense counsel stated to the jury that the trial court was "unexpectedly very short."

small pistol from his waistband, pointed it at the complainant and responded that she could give him the night deposit. Since the store had just opened, there was no "night deposit." Informed of this fact, Hill then forced the complainant and the two other women in the store to the back wall of the display area of the store. Hill then indicated that he wanted the gold jewelry the women were wearing. After obtaining most of the jewelry in their possession, Hill indicated he wanted the women's purses. The victims retrieved their purses from various rooms in the rear of the store and gave them to Hill who placed them in a plastic trash bag. Hill then forced the women back to the front of the store where the cash register was located. After obtaining the money from the cash register, Hill then forced the three women into a classroom area and forced them to lie down. Hill indicated he had no sympathy for the women and was not afraid to hurt them[6] and that if they reported the offenses he would locate them using information contained in their purses. He removed a necklace from the neck of one of the other victims and told the women to stay on the floor for ten minutes and then left the store.

The State also called the other two witnesses, who basically corroborated the complainant's version of the events.

After the robbery, all three women were shown photographic line-ups at the police station. All three women positively identified Hill in open court as the robber.[7]

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[6] Or "blow them away" as another victim testified.

[7] The store was well lit. Each victim testified she had focused on Hill's face in an attempt to memorize it for purposes of future identification of him.

The defense was limited to having two of the victims state that although the robber had worn only a short sleeved shirt, leaving his hands and forearms completely exposed during the robbery, that they did not notice a tatoo that the Appellant had on his right hand. The parties stipulated that this tatoo was on the Appellant's hand well before the robbery.[8]

Hill did not testify in his own behalf nor did he call any witnesses.

As noted above, punishment was fixed by the trial court.

On appeal, Hill's sole point of error urged that the trial court had erred in refusing his motion to dismiss the jury panel on *Batson* grounds. Hill made this motion after the parties had struck their jury lists;[9] the trial court held

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[8] The third victim did not get a clear view of the gun or the hand holding it. The robbery lasted from five to ten minutes.

[9] The Texas jury selection system begins with a jury panel or venire being seated in the courtroom. After hearing the veniremen's excuses and testing the veniremen for absolute disqualifications, the trial court then permits voir dire examination by the attorneys. Challenges for cause may then be made by the parties based on facts disclosed during voir dire. The parties are then given jury lists of the remaining veniremen which are struck by the parties. Each side, in a non-capital felony, may exercise up to 10 peremptory challenges. The struck jury lists are then returned to the clerk and the first 12 veniremen who have not been peremptory challenged by either side become the jury. *See generally*, TEX. CODE CRIM. PROC. ANN. Chapter 35.

a hearing pursuant to TEX. CODE CRIM. PROC. ANN. art. 35.261 (Vernon 1989).[10]

At this hearing the Hill established that both he[11] and one of the veniremen peremptorily challenged by the prosecutor, a Mr. Lastun, were both black. It was also established that there were two black women on the jury selected to hear the case.[12]

Without making a **formal ruling** on the **existence of a prima facie case**, the trial court then asked the prosecutor if he would like to offer a racially neutral explanation for the peremptory challenge of Lastun. The prosecutor responded that he struck Lastun because: 1) "he's black," 2) "he's male," and 3) I didn't like the way he responded to my questions.[13]

Although the Texas appellate courts based many of their holdings on their subsequent determination that the

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[10] The text of article 35.261 is reproduced in the appendix. This statute was adopted by the Texas legislature in the wake of this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986).

[11] The trial court apparently took Hill's word for his racial status after specifically refusing to take judicial notice of this fact since Hill did not "look" black. The Court of Appeals found that the trial court *did* take judicial notice of Hill's race, 787 S.W.2d at 77, but this finding is without support in the record.

[12] Although the record on appeal was silent on this point, all parties and both courts below presumed that these three veniremen were the only blacks on the jury panel.

[13] With regard to this third reason it was subsequently developed that it was *not* the *content* of Lastun's brief answers to the few individual questions addressed to him, rather the prosecutor did not like the "way he responded to my questions, his attitude, his demeanor."

prosecutor engaged in "perfunctory voir dire" examination[14] of Lastun, it should be noted here that Hill did **not** urge this at trial either as a reason to find a prima facie case or as a basis for rejection of the prosecutor's race-neutral explanations. The trial court made no findings regarding the "perfunctory" nature of the voir dire examination.

Likewise, while gender-based peremptory challenges may violate the Equal Protection Clause,[15] Hill did not urge the trial court to reject the prosecutor's gender-based explanation. Rather, in urging the trial court to call a new array,[16] Hill relied *exclusively* upon the fact that the prosecutor's explanations "contained a racially motivated reason far excluding him (Lastun) . . . it was because he was black . . . that's one of the things he (prosecutor) said." (R.III-3-4).[17] It should be observed that the trial court never ruled on the existence of a prima facie case,

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[14] The prosecutor's individual questioning of Lastun **was** brief. That examination is set forth in the Court of Appeals' opinion at 787 S.W.2d 77-78. However, the prosecutor's examination of virtually **all** the veniremen was of **similar duration**. In this regard, the prosecutor treated Lastun like all other jurors.

[15] *See, Georgia v. McCollum*, ___ U.S. ___, 60 L.W. 4574,4575, n.3 (June 18, 1992). Federal defendants may rely upon the Fifth Amendment due process in this regard. *E.g., United States v. DeGross*, 960 F.2d 1433,1438, n.6 (9th Cir. 1992) (en banc); *United States v. Bishop*, 959 F.2d 820,823 (9th Cir. 1992).

[16] An "array" in the Texas practice is the jury panel. Pursuant to Art. 35.261, C.C.P., the *only* remedy for a *Batson* violation is to dismiss the jury that has been selected and to resume jury selection using a new array.

[17] The hearing in its entirety is set forth in the Appendix.

nor did Hill press for a ruling on this issue, either before or after the prosecutor had provided his explanations.

The trial court refused to dismiss the jury panel and the case proceeded to trial. Although the trial court refused Hill's motion, it did so *without* specifying the precise reason for its ruling. Thus, the trial court may have determined that no prima facie case had been made out, or it may have found the prosecutor's explanations to be credible and race-neutral.

As noted above, Hill was convicted by the jury and sentenced by the trial court.

On initial review of the case by the Dallas Court of Appeals, the State argued that because Hill's challenge to the State's peremptory strike of Lastun was made *after* the veniremen who were not selected for jury service had been dismissed, that it was untimely under *Batson* as interpreted by the Court of Criminal Appeals' earlier opinion in *Henry v. State*, 729 S.W.2d 732,737 (Tex. Crim. App. 1987).[18] The Court of Appeals agreed that under *Henry* Hill's objection *was* untimely. However, based on its interpretation of article 35.261, TEX. CODE CRIM. PROC., and its interpretation of "impanelled"[19] as used that *statute*, the Court of Appeals held that the "*Henry* rule that *Batson* challenges must precede the dispersal of

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[18] In *Henry*, a case decided before art. 35.261, C.C.P., was in effect, the Court of Criminal Appeals held that:

> [A] defendant may make a timely challenge within the *Batson* lines if such objection is made after the composition of the jury is made known but *before* the jury is sworn and the venire panel is discharged.

Henry, at 737.

[19] "Impanelled" is *not* defined in the Code of Criminal Procedure or in art. 35.261 itself. *Hill*, 787 S.W.2d at 76.

those who will not serve, has no further validity." *Hill*, 787 S.W.2d at 76.

The Court of Criminal Appeals upheld the Court of Appeals' determination that the Texas Legislature had enacted art. 35.261 with the intention of eliminating the "reconstituted jury" remedy for an Equal Protection violation resulting from the exercise of the State's peremptory challenges. *Hill*, 827 S.W.2d at 863-64. The Court reasoned that since under art. 35.261, C.C.P., the sole remedy for such a violation is to "call a new array," and objection to the State's strike need not be lodged before the venire is discharged since if a violation is found, that venire can no longer be used.[20]

Next, the State argued that Hill's showing that a single black venireman had been struck by the State,

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[20] This argument, the State pointed out to both Texas appellate courts, is flawed in that it proceeds from the premise that the *only* function of having the venire present while the *Batson* issue is determined is to make the improperly struck veniremen available to serve as replacements should the trial court elect to remedy a *Batson* violation by restoring any improperly excluded veniremen to the original jury. However, the continued presence of the jury panel serves other functions. Disputes may arise (just as the trial court here initially disputed Hill's claim that he was black) as to the race of veniremen who are excluded by a peremptory challenge that is alleged to have been exercised in violation of *Batson*. Thus, it is critical that the challenged veniremen be on hand so that the trial court may determine their race. Such determinations may also be important as to non-challenged veniremen where the party presenting a *Batson* attack maintains that the other side *failed* to strike similarly situated veniremen of a race different from the race of the protected group *i.e.*, engaged in "disparate treatment." This approach is sometimes utilized in an attempt to refute the race-neutral explanations offered by the party defending its peremptory challenges.

while the other two black venirepersons had been allowed to serve, could not constitute the "pattern" of discrimination required to establish a prima facie case of purposeful discrimination. Without such a showing, the State argued, Hill was not entitled to have the prosecutor explain his peremptory challenges or to examine the prosecutor as to these reasons.

Although *only* a numerical analysis of the racial composition of the prosecutor's peremptory strikes had been urged at trial as a basis for finding a prima facie case, the Court of Appeals held that the "perfunctory" voir dire examination of Lastun had raised an "inference of purposeful discrimination" and that the "trial judge (had) determined that a prima facie case was established." *Hill*, 787 S.W.2d at 78. Of course, **no such finding** was made by the **trial** court and if such a finding could be said to have been *implicitly* made by the trial court, it could only have been properly based on Hill's assertion at trial that the State had peremptorily struck a black venireman, not on the "perfunctory examination" rationale which was seized upon *sua sponte* by the Court of Appeals.[21]

The Court of Criminal Appeals refused to review the Court of Appeals determination that a prima facie case of purposeful discrimination was made out. Since the prosecutor had articulated reasons for the challenged peremptory strike and the trial court had ruled on the ultimate question of intentional discrimination,[22] the existence of a

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[21] Even before the Court of Appeals, Hill made no claim that the "perfunctory examination" of Lastun supported an implicit finding of a prima facie case of the trial court.

[22] Here, the Court of Criminal Appeals relied on this Court's opinion in *Hernandez v. New York*, 500 U.S. ___, 111

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prima facie case was held to be a moot question. *Id.*, 827 S.W.2d at 865.

Finally, as to the trial court's *acceptance* of the prosecutor's non-race based explanations of shared gender and unsuitable demeanor, which the State asserted, were unrefuted at trial, the Court of Appeals held that because the "perfunctory examination" of Lastun and a reason (demeanor) deemed "unrelated to the facts of the case"[23]

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S.Ct. 1859,1866, 114 L.Ed.2d 395 (1991). *Id.* Thus, the Court of Criminal Appeals treated the trial court's action as a *non-ruling* on the existence of a prima facie case, rather than the *implicit* finding of a prima facie case interpretation of the trial court's ruling employed by the Court of Appeals. Of course, the Court of Criminal Appeals failed to consider a crucial factor distinguishing this case from *Hernandez*. In *Hernandez*, the appellate courts upheld the finding below that the government had *refuted* the prima facie case with her race-neutral explanations, whereas in the case *sub judice* the appellate courts *overruled* the trial court's ruling that Hill had failed to carry his burden on the "ultimate question of intentional discrimination." Application of the mootness doctrine is appropriate in the *Hernandez* situation, the State argues, but not in the present procedural posture.

[23] *Hill, id.*

In *Hernandez v. New York*, 500 U.S. ___, 111 S.Ct. 1859,1866, 114 L.Ed.2d 395 (1991) this Court determined that the race-neutral explanation need not be related to the facts of the case in any particular way:

> "A neutral explanation . . . means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

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the trial court's ultimate rejection of Hill's *Batson* claim could not be deemed supported by the evidence. The Court of Appeals simply failed to address the State's claims that the non-race based explanations also offered had not been refuted at trial or the related argument that the credibility of these explanations must be reviewed in light of the fact that *all* other blacks on the panel were allowed to serve on the jury as well as the fact that the resulting jury had a higher ratio of blacks than were present on the jury panel from which the jury was selected.

Finally, regarding the prosecutor's reliance on race for *part* of the reason for striking Lastun, the Court of Criminal Appeals was divided 5-4 in its analysis. The majority of the Court *agreed* in the abstract with the State's argument that

> [I]identification between the (peremptorily challenged) venireman and the (defendant) can be a legitimate race-neutral reason for the exercise of a peremptory challenge . . . even if one of the factors relied upon to establish identity is shared race, so long as there are other non-racial factors which also establish identity.
>
> * * *
>
> [R]ace may be a factor co-existing with a non-racial reason for a strike, however, race may *not* be the reason for the strike.

Hill, 827 S.W.2d at 866 (emphasis original).

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Thus, Texas has maintained that both the demeanor and the unobjected to shared-gender explanations offered by the prosecutor *were* race-neutral and since they were not refuted at trial, the acceptance of them was not clearly erroneous.

However, this abstract agreement with the State's position was *sharply limited* by other language in the majority opinion, suggesting that the existence of a high percentage of characteristics common to both the accused and the venireman struck by the government[24] could *not* constitute a race-neutral explanation for a peremptory challenge where one of the factors considered was race, *unless* there was a particular reason for race to be considered which was "related to the particular case to be tried." *Hill*, 827 S.W.2d at 868. A footnote appeared to make the majority's exception to the "bright line" rule even more restrictive: race could be properly considered *only* if the veniremen, when questioned admitted to having a "racial bias" himself. *Hill, id.* at n.8.

As to the "shared gender" reason offered by the prosecutor for striking Lastun (recall that the two black *female* venire persons were not struck), the Court of Criminal Appeals held that this was *not* a sufficient explanation to "establish a constitutional; non-race based identity." *Hill*, 827 S.W.2d at 869.

Regarding the prosecutor's explanation that focused on his perception of unfavorable demeanor on the part of Lastun,[25] the majority held this was an unsatisfactory

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[24] At oral argument the State posed the hypothetical strike of a venireman who like the defendant was a 1) black, 2) ex-Marine, 3) divorced, 4) Baptist, 5) wearing an eye-patch, and 6) employed as a truck driver, where the prosecutor states that all these shared characteristics were considered of equal importance in the decision that the venireman might be likely to (consciously or not) identify with the accused and should therefore be challenged.

[25] The Texas courts have traditionally been wary of accepting demeanor based explanations for peremptory challenges of

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explanation in light of the fact that voir dire of Lastun was "perfunctory" *Id.* at 869.

The concurring opinion of the Court of Criminal Appeals would have imposed an outright "bright line" test for partial reliance on race criminal cases[26] which it summarized as follows:

> [E]qual protection is denied whenever race is a factor in the exercise of a peremptory challenge. This . . . rule is necessary because one simply cannot articulate a race-neutral explanation for exercising a peremptory challenge when race is part of that explanation.
>
> *Hill*, 827 S.W.2d at 875 (concurring opinion).

REASONS FOR REVIEW

I.

The Court of Criminal Appeals holdings have critical importance to the interpretation of *Batson*, and if left undisturbed, the holdings will severely undermine the public's confidence in the criminal justice system.

The instant case presents this Court with an opportunity to clarify several procedural components of the mechanism for protecting Equal Protection Clause rights

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Batson-protected veniremen, fearing that such explanations may be used to mask race-based motives. Such concerns are especially overstated where as to the particular venireman in question, the prosecutor has *admitted to* race-based concerns, while maintaining that race-based motives were not dispositive.

[26] The concurring opinion stated that the Texas Supreme Court had already developed a "bright line" test for Texas civil cases. *Hill*, 827 S.W.2d at 874, citing *Powers v. Palacios*, 813 S.W.2d 489 (Tex. 1991).

first developed in *Batson v. Kentucky*.[27] As this Court has expanded the scope of the *Batson* procedure, eliminating the *Batson's* shared race standing requirement,[28] applying *Batson* procedures to civil trials,[29] limiting the right of criminal defendants to exercise their peremptory challenges based on race,[30] and as it begins to consider whether gender-based or religion-based peremptories should also be restricted,[31] the need for at least a rough framework of procedural guidelines that are uniform and capable of consistent application by the trial courts of our nation increases exponentially. In addition, this Court needs to act to restore primary control of *Batson* hearings to **trial** courts rather than allowing appellate courts to continue to be the ultimate arbiters of the facts involved in every *Batson* claim.[32]

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[27] *Batson* itself was in essence a "procedural" change from prior law, altering not the rule against racially based peremptory challenges but the *evidentiary formulation* for *establishing* such a violation.

[28] *Powers v. Ohio*, 500 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

[29] *Edmonson v. Leesville Concrete Co.*, 500 U.S. ___ (1991).

[30] *Georgia v. McCollum*, ___ U.S. ___, 60 L.W. 4574 (1992).

[31] *Id.*, at 4575, n.3; *see also, Eiland v. State*, ___ A.2d ___ (Md. Ct. Spec. App. May 29, 1992) and *State v. Burch*, ___ P.2d ___ (Wash. Ct. App., 1st Dir. May 26, 1992), both reported in 51 Cr.R.Rptr. 1245,1250.

[32] Nowhere is the trend toward appellate court control over *Batson*-related fact-finding more disturbing or widespread than in Texas, where the Court of Criminal Appeals and lower appellate courts reviewing the record on appeal routinely consider evidence *not* urged in the trial court, and utilize this evidence to conclude that the trial court's rejection of a *Batson*

(Continued on following page)

The precise procedural points raised by the instant case are outlined in the questions presented and specifically addressed in the remaining reasons for review. These issues are not limited in their scope to the instant case, rather they are issues which are inherent in virtually all *Batson* cases. While this Court's *Batson* majority sought to **enhance** "public respect for our criminal justice system,[33] respect for this system is seriously eroded when factually correct jury determinations are overturned because of what the public correctly perceives as legal technicalities. Here, for example, Hill obtains a new trial because his jury had only two rather than all three of the black veniremen on the 42 person jury venire. Yet, Hill offered only the weakest imaginable defense and elected to have the trial court set his punishment. Thus, no real issues of fact were presented to the jury.

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motion was erroneous and that the conviction must be reversed. This case, with its emphasis on the "perfunctory voir dire" issue (raised for the first time by the Court of Appeals) and *Young v. State*, 826 S.W.2d 141 (Tex. Crim. App. 1991) (defendant *not* required to request trial court to make *Batson* finding based on certain evidence introduced at hearing to enable reviewing court to consider that evidence, in overruling trial court's *Batson* determination), are the two most glaring (but by no means the only) examples of this trend. Such an approach is contrary to the practice generally followed in federal courts which is to allow the trial court "discretion to fashion the procedure necessary to evaluate counsel's race-neutral explanation," and when reviewing these credibility determinations to accord "great deference on appeal to the trial court because of the inherent credibility assessment." *E.g.*, *Moore v. Keller Industries, Inc.*, 948 F.2d 199,201 (5th Cir. 1991).

[33] *Batson v. Kentucky*, 476 U.S. 79,99 (1986).

Moreover, the important Equal Protection Clause goals that *Batson* seeks to protect are imperiled when trial court judges see their fact determinations reversed based on facts not urged at the trial hearing. The long term consequences of such second-guessing by appellate courts can only be a shift away from finding a prima facie case on the part of the trial court judges seeking to insulate themselves from an endless series of retrials, thereby frustrating the legitimate goals of *Batson*.

II.

This Court should grant review to determine whether *Batson* challenges may be raised after the jury panel has been excused.

The State believes that this Court intended that *Batson* challenges be raised as soon as the basis for the challenge became apparent,[34] rather than after the venire has been excused from service and its members have dispersed.[35]

The presence of the venire throughout the *Batson* hearing can serve important functions.[36]

The Texas courts' interpretation of the language of art. 35.261, C.C.P., in the instant case, permits a challenge to be made after the window of opportunity has closed

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[34] Obviously, this Court in *Batson* was writing for a nation in which several different types of jury selection mechanisms are employed. Thus, the Court was reluctant to detain the *precise* procedures to be employed in each state.

[35] Texas courts that considered this issue without regard to the distorting effects of art. 35.261 had uniformly held as much.

[36] *See*, n.20, *supra*.

for gathering further information from the venire and eliminates the possibility of utilizing the reconstituted jury remedy if a *Batson* violation is found by the trial court.

This Court should also review the related question of whether the Texas Legislature could properly limit the *means* available to the trial court to remedy a *Batson* violation to the new jury panel remedy. *Batson* itself purported to leave the remedy for violation of its prohibition of race-based peremptory challenges to the trial courts. *Batson*, 476 U.S. at 99, n.24. The sole remedy allowed under art. 35.261, calling a new venire, is ill-suited to the post-*McCollum* era of *Batson* hearings since many defendants do not wish to go to trial. Therefore, *Batson* violations by criminal defense counsel may be best deterred by mandating the availability of the reconstituted jury remedy.

If this Court is at all concerned with the effects the practical realities of jury trials have on the enforcement of its announced constitutional rights, it should consider this: a trial judge faced with throwing out an entire morning or day's work[37] spent on jury voir dire if a *Batson* violation is found will be much more resistant to finding a *Batson* violation than will a judge who can remedy any violation by substituting those jurors improperly struck, a resolution that can be accomplished in a few short minutes. Just as practical realities compelled development of a new evidentiary formulation for

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[37] In capital cases, where individual jury voir dire is permitted, jury selection lasts, typically three to six *weeks*, thus dramatically increasing the size of the baby that the new jury panel remedy requires be thrown out with the bath water.

establishing a violation of the Equal Protection Clause in *Batson*, such realities must be considered in formulating the remedies for such violations when they occur.

III.

This Court should determine whether in a case where no formal ruling of the existence of a prima facie case was made by the trial court and no specific reason is given by the trial court for its rejection of a *Batson* motion, the reviewing court may overrule the trial court's decision on the ultimate *Batson* issue while simultaneously refusing to consider the question of whether the party making the *Batson* challenge made out a prima facie case of purposeful discrimination on the ground that the existence of a prima facie case becomes moot simply because the attorney exercising the peremptory challenges volunteered his explanation for challenges to the trial.

At the outset, Texas recognizes that if the trial court has conducted a "full" *Batson* hearing[38] and *rejects* the *Batson* claim, where the reviewing appellate court determines that the trial court properly accepted the explanations offered as race-neutral there is little immediate utility to be found in becoming "bogged down"[39] in the

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[38] By "full" hearing the State means one in which the trial court hears the explanations of the party whose peremptory strikes are challenged and allows cross-examination of that party's attorney and then entertains any refutation of these explanations offered by the party advancing the *Batson* claim.

[39] *See, United States v. Forbes*, 816 F.2d 1006,1010 (5th Cir. 1987). There the Court of Appeals looked to Title VII case law for guidance.

issue of whether a prima facie case of purposeful discrimination was made out.[40] This Court recognized this principle only last term in *Hernandez v. New York*, where faced with a similar issue,[41] the Court stated:

> "Where the defendant (in a Title VII case) ***has done everything that would be required of him*** if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711,715 . . . The ***same principles*** applies under *Batson* ***once a prosecutor has offered a race neutral explanation*** for the peremptory challenges . . . the preliminary issue of whether the defendant made a prima facie showing becomes moot.
>
> *Hernandez*, 500 U.S. ___, 111 S.Ct. at 1866, 114 L.Ed.2d at 405.

Of course, in *Hernandez* this Court *upheld* the lower appellate court's determination that New York had provided acceptable race-neutral explanations for her challenged peremptories.

The *instant case* presents the *opposite* situation found in *Hernandez*. Here the trial court rejected the defendant's *Batson* claim without specifying the specific reason for

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[40] Of course, there is *some* utility in making such a review since the fact patterns present in the case under review, insofar as the prima facie case issues are concerned, may well be present in future cases. Thus, with an emerging body of law, such as *Batson* doctrine, appellate review of the correctness of trial court decisions on the prima facie case issue may provide much needed guidance to bench and bar.

[41] There the prosecutor had voluntarily defended his strikes and as a result the trial court had made no ruling on the existence of a prima facie case. *Hernandez*, 111 S.Ct. at 1866, 114 L.Ed.2d at 405.

this holding.[42] However, the Texas appellate courts *reversed* the trial court's ultimate rejection of the *Batson* motion and ordered a new trial after *finding* that the *prosecutor* had *not offered a credible race-neutral explanation*.

It is now axiomatic that the prosecutor's obligation to provide an acceptable explanation is conditioned upon the defendant having first establishing a prima facie case.

Where the appellate court reverses the trial court's fact finding as to the credibility of the prosecutor, the issue of the existence of a prima facie can hardly be said to be irrelevant.[43] This is particularly true where, as here:

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[42] Although the Texas Court of Appeals found an *implicit* holding that a prima facie case was made out, this approach is inconsistent with federal court practice.

[43] Although *Batson* borrowed from Title VII procedures for its analytical framework, a *Batson* hearing is *not* a civil trial on the merits. This distinction is important for several reasons.

First, in a civil trial the parties' positions have been, before trial, rather specifically defined by written pleadings which the parties have reviewed at their leisure and after having had the advantage of learning, through pre-trial discovery, virtually all of the evidence that will be offered at trial. Matters outside the pleadings will not support a verdict and evidence not disclosed in discovery will not generally be admitted at trial. By contrast, *Batson* hearings are of infinitely shorter duration. The prosecutor's explanations (which must be given for *any* race and perhaps gender of challenged veniremen, not just on one employee) are provided at a moment's notice and can be refuted on appeal, as in the instant case, by evidence and legal theories never urged at trial.

Second, a decision to exercise a peremptory challenge is not remotely similar to an employment hiring or termination decision. In the termination case the employer has the past performance of an employee to evaluate rationally, in a hiring situation there are lengthy interviews, past job performance, lie

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1) the trial court *may* have based its ruling on the lack of a prima facie case rather than an acceptance of the race-neutral explanation offered by the prosecutor, and 2) the appellate courts have found the explanation offered at trial unacceptable, but based this holding on factors *not* urged by Hill before the trial court judge.

Moreover, in light of the ever broadening application of *Batson*, to criminal defense counsel, to civil cases, to matters of gender and religion, and with the post-*Powers* elimination of the requirement of racial unity between the objecting party and the peremptorily challenged juror, the prima facie case requirement is the *only* thing which prevents every party from routinely being required to give bias-neutral explanations for each and every peremptory challenge.[44]

(Continued from previous page)

detector tests and performance tests available to evaluate in the context of the employers' needs. In jury selection, there are typically a few minutes of voir dire examination to go on. Furthermore, a lawyer must decide whether to hire (accept) or fire a juror based not only upon *his* needs, but with one eye on his opponent's perceived needs and peremptory challenges that may be exercised by the opponent.

[44] To be borne in mind here is Justice Thomas' concerns expressed in his concurring opinion in *McCollum*:

> . . . our departure from *Strauder* has taken us down a slope of inquiry that had no clear stopping point. *McCollum*, ___ U.S. ___, 60 L.W. at 4580.

This need for "stopping point" suggests that this Court should buttress, rather than eliminate the prima facie case requirement that *Batson* established as a prerequisite to a full hearing on the propriety of the exercise of the peremptory challenge.

IV.

This Court should review this case to determine whether a prima facie case can be made out by the peremptory challenge of a single black venireman where all other black veniremen on the jury panel serve on the jury.

In *Batson* this Court held that a prima facie case of purposeful discrimination can be made only by a showing that

> . . . the prosecutor has exercised peremptory challenges to remove **members** of a defendant's face from the venire . . .
>
> *Batson*, 476 U.S. at 96 (emphasis supplied).

In the instant case one black venireman was struck while the two other blacks on the panel served on the jury.

Every federal appellate court that has considered this question has held that the strike of a single black venireman cannot standing alone constitute a prima facie case.[45] Where the government has exercised a low ratio of its peremptory challenge against blacks, Texas courts have

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[45] *E.g.*, *United States v. Malendez*, 962 F.2d 332,333, n.2 (4th Cir. 1992); *United States v. Fuller*, 887 F.2d 144,147 (4th Cir. 1988); *United States v. Lewis*, 892 F.2d 735,736-37 (8th Cir. 1989); *United States v. Lewis*, 837 F.2d 415,417 (9th Cir. 1988); *United States v. Esparsen*, 930 F.2d 1461 (10th Cir. 1991); *United States v. Chalcan*, 812 F.2d 1302,1313-14 (10th Cir. 1987) (striking a single member of the defendant's race will not establish a prima facie case, *unless* jury has no members of his race); *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1923, 95 L.Ed.2d 814 (1978); *see generally*, cases collected in *United States v. Clemons*, 843 F.2d 741,746-47 (3rd Cir. 1988).

reached a similar result,[46] as have courts of her sister states especially where some blacks serve on the jury.[47]

Some federal circuit courts of appeals have held that even where the strikes are badly skewed against a racial

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[46] *Rijo v. State*, 721 S.W.2d 562,564 (Tex. App. – Amarillo 1986, no pet.) (strike of one black on panel not sufficient to establish prima facie); *see also, Campbell v. State*, 775 S.W.2d 419,422 (Tex. App. – Houston [14th Dist.] 1989, pet. ref'd). The Court of Criminal Appeals has stated "circumstantial evidence of intent may be proven by disparate impact where *all* or *most* of the challenges were used to strike blacks." *Keeton v. State*, 749 S.W.2d 861,867 (Tex. Crim. App. 1988) (opinion on rehearing).

Indeed, the Court of Criminal Appeals has recently stated that the "modicum" of evidence required to establish a prima facie case can be established by numerical analysis alone only where that analysis reveals a "repetition of such strikes in suspiciously large numbers – numbers larger than one would expect if race had nothing to do with it." *Linscomb v. State*, 829 S.W.2d 164,166 (Tex. Crim. App. 1992). The *Linscomb* court went on to state: "Establishing a *prima facie* case in this way, based only on the relative number of peremptory challenges against members of an identifiable race, is not impossible." *Id.* The instant case, however, illustrates that establishing a prima facie case in this way is *always possible* and since every veniremember belongs to some racial group, the practical effect of the opinion below is a *de facto* elimination of the prima facie case requirement.

[47] *See, State v. Griffin*, 756 S.W.2d 475,481-82 (Mo. 1988) (5 of blacks removed, trial court found no prima facie case); *Commonwealth v. Hardy*, 775 S.W.2d 919,920 (Ky. 1989) (one black struck by state, one "removed by lot," remaining black served on jury, no prima facie case); *State v. Smith*, 358 S.E.2d 389,390 (S.C. 1987) (two of five blacks struck; blacks served on jury, no prima facie case).

group numerical analysis of the peremptory challenges cannot, standing alone establish a prima facie case.[48]

This Court should determine whether the striking of a single black venireman can, standing alone, constitute a prima facie case.

V.

This Court should decide whether an appellate court applying the clearly erroneous standard may reverse a trial court's *Batson* rulings based on facts contained in the appellate record, but not specifically brought to the trial court's attention while at the same time ignoring the facts established and urged at trial that support the trial court's ruling.

In the instant case the Texas appellate courts, purporting to apply the "clearly erroneous" standard of review[49]

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[48] *United States v. Jordan*, 893 F.2d 182,183-84 (8th Cir. 1990); *United States v. Temple*, 890 F.2d 1043,1045-46 (8th Cir. 1989); and *see* case collected in *United States v. Esparsen*, 930 F.2d at 1467.

[49] The Court of Appeals applied the supported by the evidence standard that was formerly applied by Texas appellate courts to *Batson* claims. Before the case reached the Court of Criminal Appeals, that court altered the standard of review to the "clearly erroneous" standard applied by federal courts. *See, Hill*, 827 S.W.2d at 865-866. This change was made to enable the Texas courts to utilize a "well-established analysis" in order to obtain consistent results, *Whitsey v. State*, 796 S.W.2d 707,724 (Tex. Crim. App. 1989) (opinion on rehearing), although the majority Court of Criminal Appeals has always maintained the two standards of review were "analytically and intellectually the same," in the instant case the Court of Criminal Appeals disavowed "the nomenclature" used by the Court of Appeals. *Hill*, 827 S.W.2d at 866.

overruled the trial court's rejection of Hill's *Batson* challenge based primarily upon the appellate courts' determination that the voir dire of Lastun was "perfunctory."

At the same time the Texas appellate courts refused to consider at any point in their review the fact that all but one black served on the jury, although this fact was urged in both appellate courts by the State.

Thus, this case raises the issue of whether an appellate court may pick and choose which factors it will consider in reviewing a trial court's *Batson* ruling, a question that in theory should be answered "no."[50]

In the instant case, the Texas appellate courts shifted the primary focus of their inquiry from the ultimate *result* of the prosecutor's actions (whether a racially balanced jury was produced) which is a question that can be resolved without resorting to inferences of intent, to collateral questions of whether the prosecutor *arrived at* his decision based on improper motives. The motives of the prosecutor are more properly limited to questions of whether a prima facie case was established. Once that question has been answered affirmatively, matters such as *how* the voir dire was conducted must become secondary to the ultimate question of whether the entire jury

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[50] The *Whitsey* majority seemed to say that the clearly erroneous standard, like the supported by the record standard, required the appellate court to " . . . take the record as we find it . . . we cannot add facts, assume facts, disregard facts, or accord certain facts greater or lesser significance." *Whitsey*, 796 S.W.2d at 723, n.6.

The *Whitsey* court noted that under the clearly erroneous standard trial court's credibility determinations are entitled to great weight and the reviewing court should *not* undertake to "duplicate the role of the trial court." *Whitsey*, at 722.

selection process resulted in a jury that was so racially imbalanced that a just community cannot adopt that jury's verdict as its own.

VI.

This Court should grant review to determine whether there are any circumstances under which harmless error analysis may be properly applied to *Batson* error.

Generally, all trial errors even those of constitutional dimensions must be subjected to harmless error analysis[51] by the reviewing appellate court which is to consider the trial record as a whole. This principle rests on the recognition that there can be no such thing as an error free, perfect trial. *United States v. Lane*, 474 U.S. 438,445 (1986). There are of course, some categories of constitutional errors to which this Court has declined to apply a harmless error analysis, including racial discrimination in the selection of a petit jury or in the selection of a grand jury. *See, Dawson v. Delaware*, ___ U.S. ___, 112 S.Ct. 1093,1099, 117 L.Ed.2d 309 (1992) (Blackmun J. concurring). In *Rose v. Mitchell*, 443 U.S. 545 (1979), this Court refused to apply harmless error analysis to racial discrimination in the selection of grand jurors.

However, it should be noticed that when the appropriateness of application of the harmless error doctrine to racial discrimination in the grand jury selection process was again before this Court in *Vasquez v. Hillary*, 474 U.S. 254 (1986), Justice Powell, who authored this Court's opinion in *Batson v. Kentucky*, dissented to the continued

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[51] The harmless error test was enunciated in *Chapman v. California*, 386 U.S. 18 (1967).

refusal to apply harmless error analysis where the defendant was convicted in an otherwise fair trial. *Vasquez*, 474 U.S. at 268-72.[52] Likewise, Justice White who provided the crucial fifth vote in his concurring opinion in *Batson*, specifically excepted to the *Vasquez* majority's statement that racial discrimination in grand jury selection was "not amenable to harmless error review" since the effect of the violation cannot be ascertained. *Vasquez*, 474 U.S. at 609, n.6.[53]

Thus, it cannot be said that a majority of this Court has ever clearly adopted the notion that a *Batson* violation can never be properly subjected to harmless-error analysis.

Batson itself involved the conviction of a black defendant from which **all** four black veniremen had been removed by means, resulting in an all-white jury.[54] By contrast, the instant case involves the removal of only one black venireman with the other two serving on the jury.

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[52] Justice Powell wrote that:

> [A] rational system of justice recognizes that not every violation (of constitutional rights) undermines the fairness of a given conviction. *Vasquez*, 474 U.S. at 272.

[53] Reliance upon the grand jury cases as a basis for rejecting application of harmless error analysis to *Batson* issues must also be tempered with the recognition that *proof* of an Equal Protection violation requires to establishment of systematic exclusion of a racial ground from grand juries over a period of time, a much more encompassing violation than the case-by-case approach now utilized under *Batson* for proof of racial discrimination in petit jury selection.

[54] In *Batson*, this Court "surmised . . . that all white juries might judge black defendants unfairly." *McCollum*, ___ U.S. ___ at 60 L.W. at 1580 (Thomas, J. concurring).

The harm that *Batson* seeks to avoid is injury to a criminal defendant resulting from doubt cast on the integrity of the judicial process and the fairness of a criminal proceeding. *Powers v. Ohio*, 499 U.S. at ___, 111 S.Ct. at 1364.

However, in *McCollum*, Justice O'Connor observed that:

> [T]here is substantial reason to believe that the distorting influence of race is minimalized on a racially mixed jury.
>
> *Id.* ___ U.S. at ___, 60 L.W. at 4582 (O'Connor, J., dissenting).

Thus, where as here, the accused is convicted by a jury that has a *higher ratio* of blacks than did the jury panel from which the jury was selected and than the community as a whole, there is reason to believe that the *perceived* quality of fairness of the proceeding was not so undermined that the severe remedy of a new trial is required.

The State believes that the integrity of the criminal justice cannot be undermined by a conviction by a racially mixed jury, obtained in an otherwise fair trial, where the defendant, like *Hill* has offered no meaningful defense and punishment is set by the trial court. To hold otherwise is to indulge in the assumption that black jurors are inclined to acquit black defendants simply because of their shared race, a proposition that is unsupported in either fact or the theories of public perception that underlie the need for the *Batson* evidentiary formulation.

Moreover, where no defense is offered by the accused, it cannot be convincingly argued that harmless error analysis is inappropriate on the theory that the degree of harm to the defendant cannot be ascertained by the reviewing court. It hardly requires a leap of faith to assume that Hill would have been convicted by a jury

with three black jurors just as he was by a jury with two black veniremen.

Finally, this Court's holding in *McCollum* suggests an additional reason why the appropriateness the application of harmless error analysis to *Batson* rulings should now be given serious consideration by this Court. In the post-*McCollum* era it is now theoretically possible for *both parties* (in either a civil or criminal trial) to violate *Batson* in a single case and to have such violations go undetected by the trial court. In such a case, it would seem absurd to require a new trial where *both sides* have engaged in the same constitutional violation, perhaps to the same degree.[55]

CONCLUSION

For the various reasons outlined above, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

JEFFREY BRIAN KECK
Assistant District Attorney
Dallas County, Texas
Counsel of Record

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[55] See for example this Court's approach in applying the "invited reply rule" where improper jury arguments are made by both sides in *United States v. Young*, 470 U.S. 1 (1985). There, this Court was able to "consider the probable effect" of the prosecutorial arguments to determine whether the error was prejudicial, while simultaneously factoring in the remarks of defense counsel and the rest of the trial. This is surely not a task that is more difficult than applying harmless error to certain varieties of *Batson* error.

APPENDIX

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OPINIONS BELOW

[827 SW2d 860]

Michael Lee HILL, Appellant,

v.

The STATE of Texas, Appellee.

No. 347-90

Court of Criminal Appeals of Texas,
En Banc.

Jan. 8, 1992.

Rehearing Denied April 15, 1992.

[861]

Lawrence G. Boyd, Dallas, for appellant.

John Vance, Dist. Atty., and Jeffrey Brian Keck, Asst. Dist. Atty., Dallas, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

MALONEY, Judge.

Michael Lee Hill, appellant herein, was convicted by a jury of aggravated robbery. V.T.C.A., Penal Code, Section 29.03. He was sentenced by the trial court to confinement for sixty years in the Texas Department of Criminal Justice, Institutional Division. Appellant appealed to the Court of Appeals alleging that the trial court erred in denying his claim that the State violated the rule of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and article 35.261 of the Texas Code of Criminal Procedure, by exercising a peremptory challenge against

a black venireman in a racially discriminatory manner. The Court of Appeals reversed the conviction on the basis of appellant's claim. *Hill v. State*, 787 S.W.2d 74 (Tex.App. – Dallas 1990).

The State filed a petition for discretionary review raising three grounds: (1) appellant's claim was not timely; (2) appellant did not establish a prima facie case of purposeful discrimination; and (3) the Court of Appeals applied the wrong appellate standard of review in determining the correctness of the trial court's finding that the prosecutor provided a race-neutral explanation for striking a prospective juror. We granted the State's petition on all three grounds. We will affirm.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution "forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable to impartially consider the State's case against a black defendant." *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719.

In this case, there were five African-Americans on the venire. Two of the five were at the end of the panel and, thus, were not reached. Of the remaining three, two women sat on the jury and one male was peremptorily challenged by the prosecutor. When the appellant objected to the exclusion of the black male on the basis of *Batson* and article 35.261 of the Texas Code of Criminal Procedure, (V.A.C.C.P.), the prosecutor responded that he challenged the venireman "because I felt like he would identify with the defendant. He's black, he's male, and I

didn't like the way he responded to my questions." The trial court overruled appellant's objection. The Court of Appeals reversed, holding that the prosecutor violated the equal protection clause of the United States Constitution and also violated article 35.261, V.A.C.C.P., by exercising a peremptory challenge against a black venireman on the basis of his race.

I.

WAS APPELLANT'S CLAIM UNDER ART. 35.261, V.A.C.C.P. TIMELY?

Appellant voiced his objection after the venire was discharged but before the jury was sworn. The State alleges that appellant's claim should be dismissed as untimely under the authority of *Henry v. State*, 729 S.W.2d 732, 737 (Tex.Cr.App.1987), where this Court held that a *Batson* **[863]** objection must be made "after the composition of the jury is made known but before the jury is sworn and the venire panel is discharged."[1] Subsequent to the *Henry* decision, however, the legislature enacted article 35.261, specifying that a *Batson* objection can be timely interposed "[a]fter the parties have delivered their lists [of peremptory challenges] . . . and before the court has impanelled the jury." Art 35.261(a), V.A.C.C.P. Both *Henry*

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[1] We note that although the State failed to object to the timeliness of defendant's motion in the trial court, the State is not precluded from raising it on appeal. *Cooper v. State*, 791 S.W.2d 80 (Tex.Cr.App.1990) (opinion on State's motion for rehearing).

and article 35.261(a) require that the objection be made before the jury is impanelled, but only *Henry* requires that it also be made before the venire panel is discharged. Appellant contends that the time requirements of article 35.261 govern, not those set out in *Henry*. We agree with appellant.

In *Batson*, the Supreme Court did not specify the procedural mechanism for a *Batson*-based objection, explaining that

> [i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination . . . for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire. [citations omitted].

Batson, 476 U.S. at 100 n. 24, 106 S.Ct. at 1725, n. 24.

To codify and implement *Batson* in Texas, the legislature enacted article 35.261 V.A.C.C.P. *Oliver v. State*, 808 S.W.2d 492 (Tex.Cr.App.1991); *Carrion v. State*, 802 S.W.2d 83, 87-88 (Tex.App. – Austin 1990). We have held that article 35.261 was "intended to create uniform procedures and remedies to address claimed constitutional violations during jury selection." *Oliver*, at 496. Therefore, whenever a claim is made that veniremembers were peremptorily

challenged on the basis of their race, article 35.261 must be followed.

Article 35.261, V.A.C.C.P., provides:

> (a) After the parties have delivered their lists [of peremptory challenges] to the clerk . . . and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.
>
> (b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

The Court of Appeals held that, in light of the express provisions of article 35.261, *Henry*, "no longer governs the timeliness of a challenge." *Hill*, 787 S.W.2d at 76.

In *Henry*, 729 S.W.2d at 737, this Court pointed out that requiring the objection to be made before the jury is sworn and the panel is discharged allows the trial court

the option of remedying the violation by either installing the challenged veniremember to the jury or discharging the jury and calling a new array. It was also suggested in *Henry* that when and if a remedy is eradicated, the accompanying timeliness requirements should be modified.

We have examined the legislative history of Texas House Bill 65 and Texas Senate Bill 345, 70th Legislature, and find that in enacting article 35.261, the legislature considered both of the possible remedies suggested in *Henry* and held numerous hearings and debates to determine which remedy was best. Ultimately, they elected to **[863]** have the sole remedy be the call of a new array. This remedy was chosen to eliminate any possible bias toward the State which might exist if the remedy were to seat a venireman whom the State had just struck. The Senate countered House Bill 65, requiring the impanelment of a new array as a remedy, with Senate Bill 345 which would leave it to the trial court's discretion to either call a new array or reseat the improperly struck venireman. *See* Senate Committee on Criminal Justice Debate of Senate Bill 345, February 21, 1989. This bill was defeated and the original House version (House Bill 65) became article 35.261. Thus, the legislature clearly rejected the requirement that the objection be made before the venire is discharged. Art. 35.261(b), V.A.C.C.P.

As we noted in *Henry*, when the only possible remedy is the call of a new array, the objection to the strike need not be lodged before the venire is discharged since the venire will no longer be needed whether the objection

is sustained or not.[2] When the legislature speaks to an issue subsequent to this or any other court's decision on the issue, and the effect of the legislation is to modify existing caselaw, the statute shall control unless it is unconstitutional.[3]

The State alleges that this Court has already interpreted article 35.261 to include the *Henry* time limits and that, since the legislature has not acted to amend the statute to specifically exclude those time requirements, we should continue to apply them.[4] The State relies on this Court's decisions in *Brown v. State*, 769 S.W.2d 565

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[2] We note that in *Sims v. State*, 792 S.W.2d 81 (Tex.Cr.App.1990), this Court held that, although the case was tried after the effective date of article 35.261, we would not address the issue of "whether the Court of Appeals erred in concluding that reinstatement of an improperly excluded venireman to the jury is a permissible remedy under, or in spite of, Article 35.261(b)." *Id.* at 81. Since the defendant in *Sims* had requested at trial that either the juror be reinstated or a new array be called, and had not challenged the Court of Appeals' holding that he invited the error, we were not adequately presented with the issue of whether article 35.261 required that the only remedy be the call of a new array. Because the issue was not presented we dismissed the petition for discretionary review as being improvidently granted.

[3] "It is within a legislature's competence to wipe the slate clean of a judicial precedent regarded as undesirable." Keeton, Venturing To Do Justice (Cambridge, Mass.: Howard University Press, 1969), pp. 95-96.

[4] Appellant noted that there was an attempt made in the 71st legislature to amend article 35.261, V.A.C.C.P. to include the *Henry* limits, but it failed. Clearly, if the legislature had intended to include those limits it would have done so.

(Tex.Cr.App.1989) and *Cooper v. State*, 791 S.W.2d 80 (Tex.Cr.App.1990). But these cases do not support the State's argument. Brown's trial occurred prior to the effective date of article 35.261 and, therefore, *Henry* was applicable to his trial. Although Cooper's trial did occur after the effective date of article 35.261, we noted that the statute was "not mentioned by the parties or the Court of Appeals." *Cooper*, 791 S.W.2d at 81. Thus, we were not called upon to interpret the effect of article 35.261 in that case.

We now hold that *Henry* is inapplicable to the timeliness of any equal protection claim arising from the racially discriminatory exercise of a peremptory challenge after the effective date of article 35.261. Since appellant's trial occurred after the effective date of article 35.261, the provisions of article 35.261 apply. For the objection to be timely it must have been raised "[a]fter the parties . . . delivered their lists . . . and before the court . . . impanelled the jury." Art. 35.261(a), V.A.C.C.P. A jury is considered "impanelled" when the members of the jury have been both selected and sworn. *Price v. State*, 782 S.W.2d 266 (Tex.App. – Beaumont 1989). *See also, Woolls v. State*, 665 S.W.2d 455 (Tex.Cr.App.1983); *Reese v. State*, 151 S.W.2d 828 (Tex.Cr.App.1941).

Here, appellant lodged his objection after the peremptory strike had been delivered and the stricken veniremembers **[865]** excused, but before the jury was sworn. As the Court of Appeals correctly held, appellant met the requirements of article 35.261(a) and, therefore, his objection was timely.

II.
WAS THERE A PRIMA FACIE SHOWING OF RACIAL DISCRIMINATION?

In its second ground for review the State alleges that the Court of Appeals erred in holding that appellant made a prima facie showing of racial discrimination.

The United States Supreme Court recently held that where a prosecutor has articulated the reasons for his allegedly racially discriminatory peremptory challenges "without any prompting or inquiry from the trial court" and "the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). Likewise, this Court has noted that "[a]ppellate review should not become bogged down on the question of whether the defendant has made out a prima facie case [unless the ruling on the prima facie case] stop[s] the fact finding process." *Dewberry v. State*, 776 S.W.2d 589, 591 (Tex.Cr.App.1989) [citing *U.S. v. Forbes*, 816 F.2d 1006, 1010 (5th Cir.1987)].[5] Thus, the policy of this Court, like that of the United States Supreme Court, is that we will

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[5] In *Salazar v. State*, 795 S.W.2d 187 (Tex.Cr.App.1990), this Court addressed the issue of whether a prima facie case had been established because the Court of Appeals had ended the inquiry into the defendant's claim by concluding that it had not been.

not review the issue of whether the defendant established a prima facie case whether the prosecutor has articulated his reasons for the challenged peremptory strike and the trial court has ruled on the ultimate question of intentional discrimination.

In this case the prosecutor articulated all of his reasons for the exercise of his challenged peremptory strike, appellant cross-examined him, and the trial judge entered his finding. Whether the appellant established a prima facie case is a moot issue.

III.
THE STANDARD FOR REVIEW

In its third ground for review the State contends that the Court of Appeals erred by applying an incorrect standard of appellate review. The State asserts that the correct standard of review is "clearly erroneous" and cites as authority *Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1871, 114 L.Ed.2d 395 (1991) ("[W]e decline to overturn the state [trial] court's finding on the issue of discriminatory intent unless convinced that its determination was clearly erroneous.").

We have held that the correct standard of review for claims that peremptory strikes were used in a racially discriminatory manner is "clearly erroneous". *Williams v. State*, 804 S.W.2d 95, 101 (Tex.Cr.App.1991); *Tennard v. State*, 802 S.W.2d 678 (Tex.Cr.App.1990); *Whitsey v. State*, 796 S.W.2d 707, 726 (Tex.Cr.App.1989) (opinion on State's motion for rehearing). To determine whether the fact-finder's decision is "clearly erroneous", appellate courts look to the record to see if they are "left with the 'definite

and firm conviction that a mistake has been committed'." *U.S. v. Hernandez*, 887 F.2d 564, 567 (5th Cir.1989); (citing and quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)).

In this case, the Court of Appeals "consider[ed] the evidence in the light most favorable to the trial judge's rulings and determine[d] if those rulings [were] supported by the record." *Hill*, 787 S.W.2d 74 at 77. In so doing, the Court of Appeals relied upon our decision in *Keeton v. State*, **[866]** 749 S.W.2d 861, 870 (Tex.Cr.App.1988), modified by *Whitsey v. State*, 796 S.W.2d 707 (Tex.Cr.App.1989) (opinion on State's motion for rehearing).

We have held that although "clearly erroneous" is the correct appellate standard of review, "supported by the record," the appellate standard we announced in *Keeton*, was analytically and intellectually the same as "clearly erroneous". *Whitsey*, at 722-724 ("adopting the clearly erroneous standard . . . merely extend[s] the 'supported by the record' standard to its ultimate and logical conclusion"); *Williams*, 804 S.W.2d 95.

Since the standard utilized by the Court of Appeals is the functional equivalent of the "clearly erroneous" standard, we cannot say that the Court of Appeals' approach was incorrect. However, we disavow the nomenclature which the Court of Appeals used in its appellate review.

IV.
DID APPELLANT PROVE RACIAL DISCRIMINATION?

After appellant made his objection to the prosecutor's peremptory challenge, the prosecutor testified

before the court that he challenged the venireman "because I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions."

The State contends that the Court of Appeals' decision effectively creates the rule that, if a prosecutor states that the venireman's race influenced his decision to peremptorily challenge the venireman, the defendant has conclusively proven racial discrimination. But the Court of Appeals wrote,

> we must examine each of the prosecutor's reasons for striking a black potential juror within the circumstances of the particular case to determine whether the "neutral explanation" for the strike is really a pretext for a racially motivated peremptory challenge. . . . We determine that the reasons given by the prosecutor for challenging [the venireman] were unrelated to the case and based on assumptions.

Hill at 78-79.

The State urges that the Court of Appeals should have accepted the prosecutor's reason for the strike: Identity between the venireman and the appellant. The State contends that identification between the venireman and appellate can be a legitimate race-neutral reason for the exercise of a peremptory challenge against the venireman, even if one of the factors relied upon to establish the identity is shared race, so long as there are other nonracial factors which also establish identity. In support of its contention, the State relies on *Lee v. State*, 747 S.W.2d 57 (Tex.App. – Houston [1st] 1988) (pet. ref'd.). In that case the First Court of Appeals held that the prosecutor's

announced reason for the challenge, identity between the venireman and appellant, based on the fact that they were both black males and were only ten years apart in age, was a sufficiently race-neutral reason for the strike. The Court of Appeals wrote, "[a] venireman who is similar in age and might be sympathetic for a defendant can be justifiably excluded from the jury panel." *Id.* at 59. We agree that race may be a factor coexisting with a nonracial reason for a strike, however, race may *not* be the reason for the strike.

Since 1880 the United States Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to apply to jury selection, both grand and petit. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880) (holding a West Virginia statute which prohibited black citizens from serving on grant juries violative of equal protection). The Supreme Court held in *Strauder* that the Fourteenth Amendment mandates that "the law in the States shall be the same for the black as for the white; that all persons . . . shall stand equal before the laws of the States and, . . . that no discrimination shall be **[867]** made against them by law because of their color[.]" *Strauder* at 307, 25 L. Ed. 665. But it wasn't until 1965 that the Supreme Court addressed a claim that equal protection had been denied to a criminal defendant by a prosecutor's use of peremptory strikes. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).

In *Swain*, the Court first noted the great role that peremptories play in our system of jurisprudence, and realized that their very purpose is to eliminate prospective jurors for reasons which may be based on feelings,

rather than logic. *See Id.* at 220, 85 S.Ct. at 836 ("[Peremptory challenges are] exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty."). The Court then acknowledged that it was possible that prosecutors could use peremptories to discriminate against black citizens, but required, in order for an equal protection claim to be established, proof of more than just the fact that the State exercised peremptory challenges against all the black citizens on one venire. The Court held that "[t]he presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court."[6] *Id.* at 222, 85 S.Ct. at 837. However, the Court also acknowledged that it was possible that the "proof might support a reasonable inference that [black citizens were] excluded from juries for reasons *wholly unrelated to the outcome of the particular case on trial* and that the peremptory system [was] being used to *deny [black citizens] the same right and opportunity to participate in the administration of justice enjoyed by the white population.*" *Id.* at 224, 85 S.Ct. at 838 (emphasis added). If that were the case, the Court would then recognize an Equal Protection claim. Thus, in order to prove a violation of Equal Protection, a criminal defendant was required to show a pattern of invidious discrimination in not just his case, but several cases.

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[6] The Constitution guarantees "freedon from any bias against the accused . . . [and] any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes v. Missouri*, 120 U.S. 68, 71, 7 S.Ct. 350, 351, 30 L.Ed. 578, 580 (1887).

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court was asked to "reexamine that portion of *Swain* . . . concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Id.* at 82, 106 S.Ct. at 1715. In addressing this issue the Court reviewed the history of the Equal Protection Clause.

The Court in *Batson* explained that "the purpose of the Fourteenth Amendment was to put an end to governmental discrimination on account of race." *Id.* at 85-86, 106 S.Ct. at 1716-1717. "Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Id.* at 88, 106 S.Ct. at 1718 (quoting *Strauder* 100 U.S. at 308).

Quoting *Swain* 380 U.S. at 224, 85 S.Ct. at 838, the Supreme Court explained that the Equal Protection Clause makes it "impermissible for a prosecutor to use his challenges to exclude blacks from the jury 'for reasons wholly unrelated to the outcome of the particular case on trial' or to deny to blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population' " *Batson* 476 U.S. at 91, 106 S.Ct. at 1720. Further, the Court stated, "our cases concerning selection of the venire reflect the general Equal Protection principle that the 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose' ". *Id.* at 93, 106 S.Ct. at 1721 (quoting *Washington v. Davis*,

426 U.S. 229, 240, 96 S.Ct. 2040, 2048, 48 L.Ed.2d 597 (1976)). **[868]**

The overriding intent of the Equal Protection Clause, as interpreted by the Supreme Court and applied to peremptory challenges, is to protect African-Americans from discrimination against them because they are African-Americans, and to guarantee them the same rights as are enjoyed by other citizens.

The Supreme Court in *Batson* made it easier for a criminal defendant to prove that a prosecutor used peremptory challenges in violation of the Fourteenth Amendment that it had been under *Swain*. The Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719. "Of course, counsel's effort to obtain possibly relevant information about prospective jurors is to be distinguished from the practice at issue here." *Id.* at 89, n. 12, 106 S.Ct. at 1719, n. 12.

Recently, the Supreme Court recognized and held that the Fourteenth Amendment protects every race against purely racially-motivated exercises of peremptory challenges. *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 1373-1374, 113 L.Ed.2d 411 (1991). Additionally, the Supreme Court has declared that the Equal Protection clause as applied to peremptory challenges also protects prospective jurors in civil trials. *Edmonson v. Leesville Concrete Co.*, ___ U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

The Fourteenth Amendment mandates that all United States citizens called for jury duty shall be treated alike under the law. If a member of any race is struck "for reasons wholly unrelated to the outcome of the particular case on trial or in order to deny to [him/her] the same right and opportunity to participate in the administration of justice enjoyed by [others]" then the Equal Protection clause has been violated. Conversely, if a venireman is struck for reasons related to the case being tried and he would have been struck for that reason regardless of his race, the mere mention of the fact that the venireman is of a particular race does not automatically establish a *Batson* claim.[7]

The Equal Protection clause is designed to protect all citizens from being discriminated against because of their race. It does not protect them from a peremptory challenge levelled against them because of the prosecutor's reasonable belief that they can not be sufficiently impartial in the particular case on which they would sit as a juror. Unless racial discrimination against a venireman is established by the party raising the claim, the Equal Protection Clause is not implicated. Although courts must be cautious in their determination of the prosecutor's intent for the strike when he mentions race, we can conceive of scenarios in which the race of the venireman could be related to the particular case to be tried in such a

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[7] Unlike the concurring opinion, which makes a strong argument for the eradication of the peremptory challenge altogether, which decision rightly belongs in the Legislature, we do not believe that there are magic words which automatically establish a *Batson* claim.

way as to create a biased jury if race were not considered by the litigants in exercising their peremptory strikes.[8] This case does not present such a scenario.

The State alleges that there was "identity" between the venireman and appellant, however, the only evidence of similarity between the venireman and appellant was that they were both black males. The prosecutor did not articulate any other similarity. **[869]**

Batson specifically provides that a "prosecutor may not rebut the defendant's prima facie case of discrimination [based upon the prosecutor's use of peremptory challenges] by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race." *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson*, at 89, 106 S.Ct. at 1719.

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[8] In *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986), the Supreme Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." Since this holding was handed down on the same day as *Batson*, the Court did not mean to exclude this sort of bias from the State's consideration at voir dire. *See also Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

Thus the alleged identity between the venireman and appellant, based only on the shared sex and shared race of the venireman and appellant, does not escape *Batson's* prohibition against making the assumption that because the defendant and the venireman are of the same race they would identify with each other. If there were other significant similarities between appellant and the venireman, then race might have been one of those similarities which established empathy between appellant and the venireman. The Court of Appeals is correct in holding that this is not sufficient to establish a constitutional, non-race based identity. Insofar as the language of *Lee v. State*, 747 S.W.2d 57, conflicts with this opinion it is expressly disavowed.

The fact that the prosecutor mentioned race as part of his explanation for his peremptory challenge to establish an identity which is not present in indicative of purposeful discrimination in this case, but it is not conclusive. Appellant still must prove racial discrimination. Art. 35.261(a), V.A.C.C.P. In other words, appellant must show that the prosecutor's other explanations for his challenge were merely a pretext for discrimination. *See Whitsey v. State*, 796 S.W.2d 707, 726 (Tex.Cr.App. 1989) (opinion on State's motion for rehearing).

As the Court of Appeals found, the prosecutor stated that he challenged the venireman "because I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions." *Hill*, at 78. After examining the prosecutor's voir dire of the venireman in its entirety, the Court of Appeals found that it was perfunctory: "there were no meaningful questions asked upon which to challenge a juror." *Id.*

The exchange between the prosecutor and the black venireman who was subsequently struck and about whom the appellee raised his *Batson* claim, consisted of the following:

Prosecutor: Is that [venireman's last name]? Is that right, sir?

Venireman: Uh-huh.

Prosecutor: What do you do for AT&T?

Venireman: I'm a data tech –

Prosecutor: Pardon me?

Venireman: A data technician.

Prosecutor: A data technician? How long – I can barely read that. How long have you been with that company?

Venireman: Twenty years.

Prosecutor: Can you think of any reason why you would not be fair and impartial in this particular case?

Venireman: No.

Prosecutor: Okay.

We agree that the State's voir dire examination of this venireman was perfunctory. We must examine the rest of the prosecutor's reasons for this strike in light of his perfunctory voir dire. *See Whitsey*, 796 S.W.2d at 713. The prosecutor's additional reasons were: "[I] didn't like the way he [the venireman] responded to my questions . . . his attitude, his demeanor."

The only other statements made by the venireman were made in response to appellant's questions. When

asked by appellant's counsel about his prior contact with criminal activity, the venireman responded **[870]** that his coworker had been robbed. He state, however, that knowing the facts of his friend's case would not bias him in any way. When asked if he could give the defendant the benefit of "your individual judgment?" he answered, "without a doubt."

As can be seen from the reproduction of the voir dire, above, there is nothing to suggest that the venireman was hostile to the State. Illustrative of this point, when asked what answers the venireman gave that he didn't like, the prosecutor answered, "I'll have to have them read back to me. I can't remember what they were." Because the prosecutor never mentioned any specific body language, or any other nonverbal actions which led him to believe that the venireman was biased against his case, the record speaks for itself.

Appellant has carried his burden; the prosecutor's race-neutral reasons for the exercise of his strike were pretextual. The trial court's finding that the peremptory challenge was exercised for race-neutral reasons is clearly erroneous. The judgment of the Court of Appeals is affirmed. This cause is remanded to the trial court.

MILLER, J., concurs in result.

BAIRD, Judge, concurring.

I concur with the result reached by the majority; the judgment of the Court of Appeals should be affirmed. However, I write separately to address Part IV. of the majority opinion.

I. THE MAJORITY'S HOLDING

The majority phrases the State's contentions as follows: "The State contends that the Court of Appeals' decision effectively creates the rule that, if a prosecutor states that the venireman's race influenced his decision to peremptorily challenge the venireman, the defendant has conclusively proven racial discrimination." At 866. "The State contends that identification between the venireman and appellant can be a legitimate race-neutral reason for the exercise of a peremptory challenge against the venireman, even if one of the factors relied upon to establish the identity is shared race, so long as there are other nonracial factors which also established identity." At 866. The majority embraces the State's contentions by holding: "The fact that the prosecutor mentioned race as a part of his explanation for his peremptory challenge to establish an identity which is not present is indicative of purposeful discrimination in this case, *but is not conclusive.*[1] . . . [A]ppellant must show that the prosecutor's other explanations for his challenge were merely a pretext for discrimination." At 869.

II. A VIEW FROM THE UNITED STATES SUPREME COURT

The right of a citizen to participate in the administration of justice by serving on a petit jury is a very precious right in our society, second only to a citizen's right to

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[1] Unless otherwise indicated, all emphasis herein is supplied by the author.

participate in our society, second only to a citizen's right to participate in our democratic system by voting. *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 1369, 113 L.Ed.2d 411 (1991).

In *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), the defendant, a "colored man," complained of the State law which provided that no colored man was eligible to be a member of a grand jury or to serve on a petit jury. The controlling question presented in *Strauder* was:

> whether by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color[.]
>
> It is to be observed that [the question] is not whether a colored man, when an **[871]** indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color; but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

Id. at 305.

The Supreme Court deemed the question important because it demanded a construction of the "recent [13th, 14th and 15th] amendments of the Constitution." *Id.* The Court recognized that the 14th Amendment was "designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by

white persons[.]" *Id.* at 306. Under the Court's construction the "recent amendments" were ratified to provide "the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations; implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Id.* at 308.

When specifically addressing the statute of which the defendant complained the Court stated:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. at 308.

The Court concluded that the West Virginia statute's discrimination in the selection of jurors amounted to a denial of equal protection and was, therefore, unconstitutional. *Id.* at 310.

In *Carter v. Texas*, 177 U.S. 442, 444, 20 S.Ct. 687, 688, 44 L.Ed. 839 (1900), a Galveston County defendant filed a motion to quash his indictment because the grand jury commissioners, who appointed the grand jury, excluded "all colored persons or persons of African descent"

because of their race and color. The trial court overruled the motion. The defendant was convicted and sentenced to death. On appeal the defendant did not contend that the law was facially unconstitutional but rather that it was being administered in a discriminatory fashion by the grand jury commissioners who were selecting only whites as grand jurors. Nevertheless, this Court affirmed the judgment of the trial court. *See, Carter v. State*, 39 Tex.Crim. 345, 46 S.W. 236; 39 Tex.Crim. 345, 48 S.W. 508 (Tex.Cr.App.1898) (Appellant's mtn. for reh'g overruled).

In 1890, when the Supreme Court reviewed our *Carter* decision the rules of law which governed the case were already "clearly established" by Supreme Court precedent. *Carter*, 20 S.Ct. at 689.

> Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664; *Neal v. Delaware*, 103 U.S. 370, 397 26 L.Ed. 567, 574; *Gibson v. Mississippi*, 162 U.S. 565, 40 L.Ed. 1075, 16 Sup.Ct.Rep. 904.

Id. at 689.

The Supreme Court found: "The necessary conclusion is that the defendant has been denied a right duly set up and claimed **[872]** by him under the Constitution and

laws of the United States; and therefore *the judgment is reversed . . . " Id.* at 690 (Emphasis in original).

In spite of the decision in *Carter*, fifty years later, the Supreme Court was asked to review the Harris County practice of selecting individuals for grand jury service. In *Smith v. Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940), the defendant complained of the intentional and systematic exclusion of "negroes" from grand jury service. The defendant's timely filed motion to quash the indictment was denied by the trial court and that decision was affirmed by this Court. *See, Smith v. State*, 140 Tex.Crim. 565, 136 S.W.2d 842 (App. 1940). The Texas statutory scheme was capable of being carried out with no racial discrimination. However, because of the wide discretion permissible under the statute it was equally capable of being applied in a discriminatory manner. In *Smith*, two grand jury commissioners testified that "their failure to select Negroes was because they did not know the names of any who were qualified and the other said that he was not personally acquainted with any members of the Negro race." *Smith*, 61 S.Ct. at 166. In reversing the defendant's conviction the Supreme Court held:

> It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

Id. at 165.

In *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950), the defendant attacked the way the statutory method of grand jury selection had been administered by the grand jury commissioners of Dallas County. The defendant contended the commissioners were limiting the number of "Negroes selected for grand-jury service to not more than one on each grand jury." *Cassell*, 70 S.Ct. at 631. The Supreme Court held:

> Jurymen should be selected as individuals, on the basis of individual qualifications, and not as members of a race.
>
> *An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race.*

Id.

Holding that a proposal racial limitation was forbidden under the 14th Amendment, *Id.* at 632, the Supreme Court again reversed a judgment of this Court. *See, Cassell v. State*, 154 Tex.Crim. 648, 216 S.W.2d 813 (App.1949).

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) the Supreme Court confronted for the first time the use of peremptory challenges as a device to exclude jurors because of their race. The Court re-stated the principle that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain*, 85 S.Ct. at 826.

The question of whether a defendant had met the *Swain* burden of proving purposeful discrimination was re-visited in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct.

1712, 90 L.Ed.2d 69 (1986). The *Batson* court recognized that while many of the earlier decisions by the Supreme Court had "been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury." *Batson*, 106 S.Ct. at 1718. Accordingly, "the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.' " *Id.*, quoting *Avery v. Georgia*, 345 U.S. 559, 562, 73 S.Ct. 891, 893, 97 L.Ed. 1244 (1953). Therefore, "the State's privilege to strike **[873]** individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause." *Batson*, 106 S.Ct. at 1719.

The *Batson* Court described *Swain* as having placed on defendants a crippling burden of proof which had the effect of immunizing prosecutors from constitutional scrutiny. *Id.* at 1721. Consequently, the *Batson* Court relaxed the *Swain* burden. *Id.* at 1723. After establishing a prima facie case of purposeful discrimination in the selection of the petit jury, the burden shifts to the State to come forward with a "neutral explanation" for challenging black jurors. *Id.* at 1723. When describing the State's burden the Supreme Court held in part:

> . . . Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, [citation omitted] so it *forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on*

> *account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.* Nor may the prosecutor rebut the defendant's case merely be denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' [citation omitted] If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.' [citation omitted] *The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried.*

Id. at 1723.

In *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 1366, 113 L.Ed.2d 411 (1991), the Supreme Court reaffirmed the premise "that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." The *Powers* court extended the holding in *Batson* and held that "a criminal defendant may object to race-based exclusion of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." *Id.* Relevant to the issue presented in the case at bar the *Powers* Court held:

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. *An individual juror does not have a right to sit on any particular petit jury, but he or*

> *she does possess the right not to be excluded from one on account of race.*
>
> It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. *Race cannot be a proxy for determining juror bias or competence.* 'A person's race simply 'is unrelated to his fitness as a juror' '. [citations omitted]. We may not accept as a defense to racial discrimination the very stereotype the law condemns.

Id. 111 S.Ct. at 1370.

The foregoing cases convincingly demonstrate the principle that race shall play *no* part in the jury selection process. The exclusion of minority citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure. *Batson* 106 S.Ct. at 1716. The Equal Protection Clause guarantees the defendant that the State will not exclude members from the jury on account **[874]** of race. *Strauder,* 100 U.S. at 305. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability to consider impartially the evidence presented at trial. *Batson,* 106 S.Ct. at 1718. *A person's race is simply unrelated to his fitness as a juror. Id.*

III. A VIEW FROM TEXAS COURTS

Recently, our sister Court considered a similar issue in *Powers v. Palacios*, 813 S.W.2d 489 (Tex.1991). In *Powers* the plaintiff sought to question the defendant, Palacios, to establish a racially discriminatory use of peremptory strikes. Palacios conceded that race was a factor in his determination to exercise his peremptory strikes. *Id.* at 490. In reversing the judgment and remanding the case for a new trial the unanimous Court held:

> Here, Powers established that opposing counsel had exercised a peremptory challenge discriminatorily. [footnote omitted] Such 'automatic invocation of race stereotypes retards [our] progress [as a multiracial democracy] and causes continued hurt and injury.' *Edmonson [v. Leesville Concrete Co., Inc.]*, ___ U.S. at ___, 111 S.Ct. at 2088. *We hold that equal protection is denied when race is a factor in counsel's exercise of a peremptory challenge to a prospective juror.*

Id. at 491.

A similar issue was addressed by the First Court of Appeals in *Speaker v. State*, 740 S.W.2d 486 (Tex.App. – Houston [1st Dist.] 1987). The *Speaker* Court held:

> In this case, the trial court never reached the point of a factual determination of whether purposeful discrimination had been proven because the prosecutor's explanation of his peremptory strikes was facially inadequate as a matter of law. At the hearing on the motion for new trial, the prosecutor admitted:
>
> > Although race is a factor I do consider, it is not an overriding factor and it was not an

> overriding factor in Mr. Speaker's trial in the selection of these jurors.
>
> While the prosecutor's candor is commendable, his statement clearly shows that he considered race a factor while selecting the jurors in the appellant's trial. This basis for juror selection has traditionally been condemned. *See Cassell v. Texas*, 339 U.S. 282, 287, 70 S.Ct. 629, 632, 94 L.Ed. 839 (1950) ([a]n accused is entitled to have the charges against him considered by a jury in the selection of where there has been neither inclusion nor exclusion because of race). *While we realize that it may be unrealistic to expect the prosecutor to put aside every improper influence when selecting a juror, we conclude that that is exactly what the law requires. Thus, a prosecutor's admission that race was an influencing factor in the selection process vitiates the legitimacy of the entire procedure. See Batson* 106 S.Ct. at 1719; *Neal v. Delaware*, 103 U.S. (Otto) 370, 397, 26 L.Ed. 567 (1881).

Speaker, 740 S.W.2d at 489.

A similar issue arose in *McKinney v. State*, 761 S.W.2d 549, 551 (Tex.App. – Corpus Christi 1988) where the State admitted that race was not *the reason* but was *a factor* in peremptorily challenging the black venireman. *Id.* at 550. Emphasis in original. Judge Benavides, then a Justice on the Corpus Christi Court of Appeals, held:

> In the case before us, the prosecutor did not rebut the appellant's prima facie case of discrimination by articulating a neutral explanation for the peremptory strike, but rather confirmed the discrimination by admitting that race was a factor in striking Evans. No "neutral explanation"

> can serve to rebut the presumption that the condemned practice of exclusion based on race occurred when the prosecutor admits that such an exclusion did occur. . . .

McKinney, 761 S.W.2d at 551. [875]

The majority, while failing to mention or distinguish *Powers*, *Speaker*, or *McKinney*, holds "that race may be a factor contributing to a non-racial reason for the strike, however, race may *not* be the reason for the strike." At 866. Such a holding fails to recognize that the Equal Protection Clause *forbids* the State to strike minority veniremen "on the assumption that they will be biased in a particular case *simply because*" the defendant is also a minority. *Batson*, 106 S.Ct. at 1723.

The majority reads this opinion as "mak[ing] a strong argument for the eradication of the peremptory challenge altogether." At 868, n. 7. I strongly disagree. No one who has participated in the selection of a jury can discount the importance of the peremptory challenge. Indeed, we have elevated the intelligent use of peremptory challenges to a Constitutional right. *See, Naugle v. State*, 118 Tex.Crim. 566, 40 S.W.2d 92, 94 (App. 1931). However, that right is "subject to the commands of the Equal Protection Clause." *See, Batson*, 106 S.Ct. at 1719. Therefore, while the right to peremptorily challenge a venire member is important, its importance is clearly outweighed when the peremptory challenge is used to deny, on the basis of race, a citizen's Constitutional right to participate in the administration of justice by serving on a jury. Discrimination has no place in the qualification or selection of jurors and offends the dignity of the individuals and the integrity of the Court. *Powers*, 111 S.Ct. at 1366. The Equal

Protection Clause extends to all citizens the rights and privileges of serving as a juror. Therefore, while the human condition will probably continue to fight for the freedom to discriminate, the justice system must not provide a means to that end. *See*, Garcia, *Strike Three and It's Out – There Goes the Peremptory*, The Houston Lawyer, November-December 1991, at 22.

IV. ESTABLISH A BRIGHT LINE RULE

I would remain true to the clear intent and purpose of more than a century of established precedent from the United States Supreme Court. We should adopt the holdings in *Speaker*, *McKinney*, and *Powers* and immediately establish the following "bright line" rule: equal protection is denied whenever race is a factor in the exercise of a peremptory challenge. This "bright line" rule is necessary because one simply cannot articulate a "race-neutral" explanation for exercising a peremptory strike when race is a part of that explanation.

With these comments I concur in the results reached by the majority.

CLINTON, OVERSTREET and BENAVIDES, JJ., join this opinion.

[787 S.W.2d 74]

Michael Lee HILL, Appellant,

v.

The STATE of Texas, Appellee.

No. 05-88-01234-CR.

Court of Appeals of Texas, Dallas.

Jan. 18, 1990.

Rehearing Denied Feb. 21, 1990.

Discretionary Review Granted
May 30, 1990.

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[75]

Lawrence G. Boyd, Dallas, for appellant.

Jeffrey B. Keck, Dallas, for appellee.

Before HOWELL, BAKER and OVARD, JJ.

OPINION ON MOTION FOR REHEARING

OVARD, Justice.

That State's motion for rehearing is denied. Our opinion of July 31, 1989 is withdrawn and this opinion issued in lieu thereof.

A jury convicted Michael Lee Hill of aggravated robbery and assessed punishment at sixty years' confinement. In his sole point of error, Hill contends that the trial court erred in overruling his objection to the State's use of a peremptory challenge. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Hill argues that the State improperly struck a venire-member based on racial

grounds, thereby violating *Batson* and article 35.261(a)[1] of the Texas Code of Criminal Procedure. Because we agree, we reverse and remand this case.

Following voir dire, a list of the twelve selected jurors was prepared, and the trial court announced their names. The trial court dismissed the venire and directed the twelve jurors into the jury room. Hill then objected, moved that the jury be dismissed, and called for a new array. The State did not object to this request as being untimely. Hill based his request for a *Batson* hearing under article 35.261 on the fact that he was black and that the only venire-member struck by the State was black. The trial court apparently determined that a prima facie case of discrimination had been established because it directed the prosecutor to offer race-neutral explanations for the State's peremptory challenges. When the prosecutor concluded his explanations, the trial court overruled Hill's objection. The jury was then sworn.

The initial question we must resolve is whether Hill's *Batson* challenge was timely raised after the twelve jurors' names were called and the venire dismissed, but before the jury was sworn. In support of its argument that the objection to the jury selection process was untimely, the State relies upon *Henry v. State*, 729 S.W.2d 732, 737 (Tex.Crim.App.1987), in which the court of criminal appeals declared prospectively:

> [A] defendant may make a timely objection within the *Batson* lines if such objection is made

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[1] Hereafter, all references to article 35.261 are to Tex.Code Crim.Proc.Ann. art. 35.261 (Vernon 1989).

> after the composition of the jury is made known but *before* the jury is sworn and the venire panel is discharged. It is at this time that the trial court has a number of options to correct any error discovered in a *Batson* hearing (including disallowing a prosecutor's strike and installing a minority member on the jury, should the court deem that to be the appropriate remedy, or discharging the jury and convening another venire panel, which might also be deemed appropriate in a given case). **[76]**

Id. at 737. The State argues that, under the *Henry* rule, Hill's objection, first made after the venire was excused, was untimely because it precluded the trial court from curing any error by disallowing one or more of the State's strikes and seating other jurors from the venire.[2]

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[2] The State also relies on the pre-*Henry* case of *Price v. State*, 726 S.W.2d 611, 612-13 (Tex.App. – Houston [14th Dist.] 1987, no pet.), in which the appellate court applied the same rule later prescribed in *Henry*, albeit for a different reason, and concluded that defendant's objection was untimely. In *Price*, the court reasoned that a defendant must object before the venire is excused because, without the venire still before him, a later objection prejudices the prosecutor's ability to give racially neutral reasons for his challenges. *Id.* at 612-13.

We are not persuaded by the *Price* rationale that the prosecutor may be prejudiced by having to offer racially neutral reasons for the exercise of his strikes after the venire is discharged because he can no longer associate names and faces. Typically, in this jurisdiction, attorneys exercise their strikes outside the presence of the venire. If counsel can exercise their strikes without associating names and faces, they can explain them under the same conditions. Moreover, in the case at bar, the State indicated no need for again observing the struck venire members.

(Continued on following page)

Henry, however, no longer governs the timeliness of a challenge. Following the *Henry* decision, the Legislature enacted article 35.261 of the Texas Code of Criminal Procedure, which states in pertinent part:

> (a) After the parties have delivered their lists to the clerk . . . and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case. . . .
>
> (b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.

The *Henry* rule that a timely objection must be made "before the jury is sworn and the venire panel is discharged" has been replaced by the article 35.261(a) requirement that an objection, to be timely, must be made "before the court has impanelled the jury." The issue we must resolve is whether the jury was impanelled when the venire was discharged, or, alternatively, whether the jury was impanelled when it was sworn.

(Continued from previous page)

We further note that the remedy afforded by *Henry* was abatement for the limited purpose of determining if the prosecutor possessed a racially neutral explanation for the strikes. *Henry*, 729 S.W.2d at 737. *Henry* implies a finding that a prosecutor should be able to explain the basis of the peremptory strikes at a subsequent hearing. The reasoning in *Price* has been severely diminished by *Henry*.

Impanelling is not defined by article 35.261; however, Texas law has long held that impanellment, at least impanellment by "the court," is not complete until those who are chosen to serve has been both selected and sworn. *See, e.g., Woolls v. State,* 665 S.W.2d 455, 467 (Tex.Crim.App.1983), *cert. denied,* 468 U.S. 1220, 104 S.Ct. 3592, 82 L.Ed.2d 889 (1984) (jury not impanelled until sworn as a body); *Reese v. State,* 142 Tex.Crim. 254, 266-67, 151 S.W.2d 828, 835 (1941) (impanelled implies grand jurors sworn); *Howard v. State,* 80 Tex.Crim. 588, 591-92, 192 S.W. 770, 772 (1917) (jury not impanelled until sworn); *Stephens v. State,* 33 Tex.Crim. 101, 102, 25 S.W. 286, 286 (1894) (jury not impanelled until sworn); *Rippey v. State,* 29 Tex.App. 37, 42-44, 14 S.W. 448, 449 (1890) (jury not impanelled until sworn as a body); *see also* B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 212 (1987).

Of course, none of these cases are directly on point because the *Batson* rule is of recent vintage and article 35.261 is of even more recent vintage. What is apparent, however, is the the *Henry* rule, to the effect that *Batson* challenges must precede the dispersal of those who will not serve, has no further validity. The basis for this part of the *Henry* rule has been eliminated by 35.261 which declares that a new venire must be called in all instances where the *Batson* challenge is sustained. The State directs our attention to *Brown v. State,* 769 S.W.2d 565, 568 (Tex.Crim.App.1989), and *Green v. State,* 771 S.W.2d 576, 576-77 (Tex.App. – Houston [14th dist.] 1989, no pet.), to support its position that a *Batson* issue must be raised prior to the panel's dismissal. The trial in *Brown* occurred **[77]** prior to the effective date of article 35.261. In *Green,* article 35.261 was not even considered by the court; nor

does the opinion reflect the date of the trial. Therefore, neither of these cases is dispositive of this issue.

We determine that the reasonable rule, comporting with the longstanding interpretation of "impanelled" by the court of criminal appeals, and comporting with fairness to all parties, must be that a *Batson* challenge is not barred as long as it is presented before the jury is sworn. A jury selection process has not reached its logical conclusion until the oath has been administered. At this moment, another phase of the trial commences. The *Batson* deadline must be clear and understandable. To follow the longstanding rule that impanellment is not complete until the jurors are sworn assures that the defendant and his attorney will have a fair opportunity to observe each of the twelve who have been selected and to determine whether any of the State's strikes have been applied against persons of the same race as the defendant. Until he has this information, the defendant has no basis for a *Batson* challenge. We conclude that the swearing of the jury provides the most reasonable, definitive point for a *Batson* challenge under article 35.261.

We now consider Hill's *Batson* claim. In determining whether appellant's rights have been violated under *Batson*, the standard of review to be applied is whether purposeful discrimination was established. *Keeton v. State*, 749 S.W.2d 861, 867 (Tex.Crim.App.1988) (*Keeton II*). We must consider the evidence in the light most favorable to the trial judge's rulings and determine if those rulings are supported by the record. If the record supports the findings of the trial court, they will not be disturbed on appeal. *Keeton II*, 749 S.W.2d at 870.

In order to invoke the protection set forth in *Batson*, a defendant must raise an inference of purposeful discrimination and the trial court must determine that a prima facie case of discrimination exists by virtue of the State's use of its peremptory challenges. A defendant may establish this by showing:

1. that he is a member of a cognizable racial group;
2. that the prosecutor has exercised peremptory challenges to remove members of the defendant's race from the venire (peremptory challenges constitute a jury selection practice which permits those to discriminate who are of a mind to discriminate); and
3. these facts and any other relevant circumstances which raise an inference that the prosecutor used peremptory challenges to exclude the veniremen on account of their race.

Batson, 476 U.S. at 96, 106 S.Ct. at 1723; *See Keeton v. State*, 724 S.W.2d 58, 65 (Tex.Crim.App.1987) (*Keeton I*); *see also* TEX.CODE CRIM.PROC.ANN. art. 35.261(a) (Vernon 1989).

The record reflects that Hill is black. At the conclusion of voir dire, but before the jurors were sworn, Hill's attorney made the following objection:

> Pursuant to the Code of Criminal Procedure, Article 35.261, I'd like the record to reflect and the Court to take judicial notice that the client – my client, Michael Lee Hill, is a black man and . . . I'd also like the Court to judicially notice that James Lastun was Juror No. Four, who is a black man, and he was peremptorily challenged by the State of Texas.

The judge took judicial notice of the race of both Hill and Lastun.

Among the factors that can be used to raise an inference of discrimination are "the type and manner of questions directed to the challenged juror, including a lack of questions or a lack of meaningful questions." *Keeton II*, 749 S.W.2d at 867. The State's entire voir dire of Lastun consisted of the following:

> STATE: Is that Lastun? Is that right, sir?
>
> LASTUN: Uh-huh.
>
> STATE: What do you do for AT & T?
>
> LASTUN: Im a data tech –
>
> STATE: Pardon me?
>
> LASTUN: A data technician.
>
> STATE: A data technician? How [78] long – I can barely read that. How long have you been with that company?
>
> LASTUN: Twenty years.
>
> STATE: Can you think of any reason why you would not be fair and impartial in this particular case?
>
> LASTUN: No.
>
> STATE: Okay.

In our view, this demonstrates only a perfunctory examination of Lastun; there were no meaningful questions asked upon which to challenge a juror. Consequently, we hold the record reflects that Hill raised an inference of purposeful discrimination and the trial judge determined

that a prima facie case of discrimination was established. The burden then shifted to the State to come forward with racially neutral explanations as to why peremptory challenges were exercised against veniremen of the same cognizable racial group as defendant. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; *Keeton I*, 724 S.W.2d at 65; *see* TEX.CODE CRIM.PROC.ANN. art. 35.26(a) (Vernon Supp.1989). The trial judge conducted such a hearing, requiring the prosecutor to state his reasons for exercising a peremptory challenge against Lastun. *See Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. When asked by the trial court to give a racially neutral explanation, the prosecutor replied, "Your Honor, I struck Mr. Lastun because I felt he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions."[3] When Hill's attorney asked the prosecutor which of Lastun's answers he did not like, the prosecutor replied, "I'll have to have them read back to me. I can't remember what they were, but I just didn't like the way he responded to my questions, his attitude, his demeanor." In overruling the *Batson* objections, the trial court impliedly found that the prosecutor had presented a racially neutral explanation.

> The trial judge cannot merely accept the specific reasons given by the prosecutor at face value, the judge must consider whether the facially neutral explanations are contrived to avoid

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[3] The prosecutor's explanation rings similar to the blatant constitutional violation condemned where the prosecutor stated, "I struck that prospective juror because he is black." *See Whitsey v. State*, No. 1121-87 slip op. at 7 (Tex.Crim.App. May 10, 1989).

admitting acts of group discrimination. This evaluation by the trial judge is necessary because it is possible that an attorney, although not intentionally discriminating, may try to find reasons other than race to challenge a black juror, when race may be his primary factor in deciding to strike the juror.

Keeton II, 749 S.W.2d at 868.

Factors that weigh heavily against the legitimacy of a racially neutral explanation given by a prosecutor include: no examination or only a perfunctory examination of the challenged juror and a reason given for the challenge which is unrelated to the facts of the case. *Keeton II*, 749 S.W.2d at 866. In reviewing the trial court's decision, we must consider the evidence in the light most favorable to the trial judge's rulings and determine whether those rulings are supported by the record. If the record supports the trial court's findings, we will not disturb those findings on appeal. *Id.* at 870. However, we must examine each of the prosecutor's reasons for striking a black potential juror within the circumstances of the particular case to determine whether the "neutral explanation" for the strike is really a pretext for a racially motivated peremptory challenge. *Keeton II*, 749 S.W.2d at 868. In making this determination, we must ascertain whether the prosecutor has articulated a "clear and reasonably specific" explanation of "legitimate reasons" for striking the black veniremember. *Batson*, 476 U.S. at 97-98, 98 n. 20, 106 S.Ct. at 1723-24, 1724 n.20. Otherwise, the prosecutor's explanation is not sufficient to overcome defendant's prima facie showing of purposeful discrimination.

Justice Powell stated in *Batson* that "the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption or his intuitive judgment that they would be partial to the defendant because of their shared race. . . . " *Batson*, 476 U.S. at 95, 106 S.Ct. at 1722. Guided by the aforementioned rules, we determine that the reasons **[78]** given by the prosecutor for challenging Lastun were unrelated to the case and based on assumptions. The exclusion of even one member of appellant's race from the jury for racial reasons invalidates the entire jury selection procedure and entitles a defendant to a new trial. *Keeton II*, 749 S.W.2d at 871 (Teague, J., concurring).

The record does not support the trial court's ruling. Therefore, we conclude that the prosecutor failed to present racially neutral explanations to rebut Hill's prima facie case of purposeful discrimination against Lastun. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723; *Keeton I*, 724 S.W.2d at 65.

We reverse and remand this case for a new trial before a jury that is selected in a racially neutral manner.

[SEAL] OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

April 15, 1992

COA#: 05-88-01234-CR

RE: Case No. 0347-90
STYLE: Hill, Michael Lee

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

[SEAL] OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

May 4, 1992

COA#: 05-88-01234-CR

RE: Case No. 0347-90
STYLE: Hill, Michael Lee

ON THIS DAY THE STATE'S SECOND MOTION FOR REHEARING HAS BEEN DISMISSED.

Thomas Lowe, Clerk

[SEAL] OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

May 29, 1992

COA#: 05-88-01234-CR

RE: Case No. 0347-90
STYLE: Hill, Michael Lee

On this day the State's Motion to Recall the Mandate has been DENIED.

Thomas Lowe, Clerk

(SEAL)

Office of the Attorney General

State of Texas

DAN MORALES
ATTORNEY GENERAL

April 27, 1992

Mr. Jeffrey B. Keck
Assistant District Attorney
Frank Crowley Courts Bldg.
133 N. Industrial Boulevard-LB 19
Dallas, Texas 75207-4313

Re: *Hill v. State*

Dear Jeff:

This letter is (1) to inform you that our office has decided not to seek review in the above referenced case and (2) to authorize your office to seek certiorari review.

If you have any questions, do not hesitate to call me at (512) 463-2080.

Yours truly,

/s/ Charles
CHARLES A. PALMER
Assistant Attorney General
Assistant Chief, Criminal Law
Enforcement Division

CAP/kh

512/463-2100 P.O. BOX 12548 AUSTIN, TEXAS
78711-2548

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BATSON HEARING

[p. 2] October 4, 1988 – Afternoon Session (Cont.)

PROCEEDINGS

(Trial jury selected and impaneled, after which following proceedings had in open court.)

THE COURT: Ladies and gentlemen of the jury, before we go any further, we'll have to have a short hearing. I'm going to ask you to go back in that jury room right through that door. The twelve of you go right in there.

(Jury retired from courtroom, after which following proceedings had outside presence and hearing of jury.)

THE COURT: Okay, Mr. Boyd. Do you have a motion to make to the Court?

MR. BOYD: Yes, Your Honor. Pursuant to the Code of Criminal Procedure, Article 35.261, I'd like the record to reflect and the Court to take judicial notice that the client – my client, Michael Lee Hill, is a black man and that –

THE COURT: I don't know whether I can notice that or not. He doesn't look very black to me.

[p. 3] Are you a black man, Mr. Hill?

THE DEFENDANT: Yes, sir, I am.

THE COURT: Go ahead.

MR. BOYD: I'd also like the Court to judicially notice that James Lastun was Juror No. four, who is a

black man, and he was peremptorily challenged by the State of Texas.

THE COURT: James Lastun. All right.

Mr. Pickett, would you like to offer any racially neutral explanation why the State used a peremptory on Mr. Lastun?

MR. PICKETT: Your Honor, I struck Mr. Lastun because I felt like he would identify with the defendant. He's black, he's male, and I didn't like the way he responded to my questions.

THE COURT: Okay. That's an explanation. Do you have anything further, Mr. Boyd?

MR. BOYD: Well, Your Honor, may I ask the prosecutor a couple of questions?

THE COURT: All right. Go ahead.

MR. BOYD: What questions did you not like the answers to?

MR. PICKETT: I'll have to have them read back to me. I can't remember what they were, but I just didn't like the way he responded to my questions, his attitude, his demeanor.

[p. 4] THE COURT: Well, I don't know whether it's necessary for him to identify which questions and which answers he didn't like.

MR. BOYD: Now, you did ask him if he could be fair and impartial, and he did respond that he could be; is that correct?

MR. PICKETT: As did everybody that qualified on the jury.

MR. BOYD: Okay. Your Honor, I believe that the prosecutor's reason already contained a racially motivated reason for excluding him. He said it was because he was black, was one of the things that he said, and I would like to move that the Court dismiss the array and call a new array in the case.

THE COURT: That motion is denied. I overrule your objection.

Bring the jury in. We'll swear them in.

MR. PICKETT: Is there another one?

THE COURT: Anything further?

MR. BOYD: No, that's it.

THE COURT: This was just one that you struck.

MR. PICKETT: Your Honor, I would like the record to reflect that there are two black women sitting on this jury.

THE COURT: Okay. The record will so reflect.

MR. PICKETT: Thank you.

[p. 5] THE COURT: Bring the jury in.

(Jury returned into open court and following proceedings in the presence and hearing of the jury.)

THE COURT: Ladies and gentlemen, would you each hold up your right hands?

RELEVANT STATUTES

At the time of Hill's trial the provisions of TEX. PENAL CODE ANN and TEX. CODE CRIM. PROC. ANN read as follows:

Texas Penal Code provisions:

§ 29.02. Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code[1] and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

§ 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

(1) causes serious bodily injury to another; or

(2) uses or exhibits a deadly weapon.

(b) An offense under this section is a felony of the first degree.

Texas Code of Criminal Procedure provisions:

Art. 35.10. Court to Try Qualifications

When no challenge to the array has been made, or if made, has been over-ruled, the court shall proceed to try the qualifications of those present who have been summoned to serve as jurors.

Art. 35.11. Preparation of List

The trial judge, upon the demand of the defendant or his attorney, or of the State's counsel, shall cause the names of all the members of the general panel drawn or assigned as jurors in such case to be placed in a receptacle and well-shaken, and the clerk shall draw therefrom the names of a sufficient number of jurors from which a jury may be selected to try such case, and such names shall be written, in the order drawn, on the jury list from which the jury is to be selected to try such case, and write the names as drawn upon two slips of paper and deliver one slip to the State's counsel and the other to the defendant or his attorney.

Art. 35.14. A Peremptory Challenge

A peremptory challenge is made to a juror without assigning any reason therefor.

Art. 35.15. Number of Challenges

* * *

(b) In non-capital felony cases, the State and defendant shall each be entitled to ten peremptory challenges.

If two or more defendants are tried together each defendant shall be entitled to six peremptory challenges and the State to six for each defendant.

Art. 35.17. Voir Dire Examination

1. When the court in its discretion so directs, except as provided in Section 2, the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.

* * *

Art. 35.25. Making Peremptory Challenge

In non-capital cases and in capital cases in which the State's attorney has announced that he will not qualify the jury for, or seek the death penalty, the party desiring to challenge any juror peremptorily shall strike the name of such juror from the list furnished him by the clerk.

Acts 1965, 59th Leg., p. 317, ch. 722, § 1, eff. Jan. 1, 1966.

Art. 35.26. Lists Returned to Clerk

(a) When the parties have made or declined to make their peremptory challenges, they shall deliver their lists to the clerk. Except as provided in Subsection (b) of this section, the clerk shall, if the case be in the district court, call off the first twelve names on the lists that have not been stricken. If the case be in the county court, he shall call off the first six names on the lists that have not been stricken. Those whose names are called shall be the jury.

(b) In a capital case, the court may direct that two alternate jurors be selected and that the first fourteen

names not stricken be called off by the clerk. The last two names to be called are the alternate jurors.

Art. 35.261. Peremptory Challenges Based on Race Prohibited

(a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impanelled the jury, the defendant may request the court to dismiss the array and call a new array in the case. The court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

(b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case.